Supreme Court of the United States

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

MAURICE A. FINKLE, Executor of the last will and testament of ISAAC FINKLE, deceased, MAURICE A. FINKLE and KATHARYN H. FINKLE, his wife, NATHAN N. FINKLE and BESS P. FINKLE, his wife, LESTER J. FINKLE and BESSIE H. FINKLE, his wife, BESSIE E. LUBIN, MAURICE R. BLOCK, CAROLYN LAVINE and TALBERT LAVINE, her husband, S. LESTER BLOCK and RUTH BLOCK, his wife, *Petitioners*,

v.

HOUSING AUTHORITY OF THE CITY OF TRENTON, a body corporate and politic of the State of New Jersey, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Maurice A. Finkle, Executor of the last will and testament of Isaac Finkle, deceased, Maurice A. Finkle and Katharyn H. Finkle, his wife, Nathan N. Finkle and Bess P. Finkle, his wife, Lester

J. Finkle and Bessie H. Finkle, his wife, Bessie E. Lubin, Maurice R. Block, Carolyn Lavine and Talbert Lavine, her husband, S. Lester Block and Ruth Block, his wife, respectfully pray the issuance of a writ of certiorari to the Supreme Court of New Jersey to review the judgment and decision of that Court rendered on October 3, 1960, which judgment and decision denied to petitioners their petition to that Court for certification to the Superior Court of New Jersey, Appellate Division, to review the judgment of said Superior Court, Appellate Division, of July 5, 1960. Said judgment of the Appellate Division affirmed the judgment of the Superior Court of New Jersey, Law Division, rendered on July 2, 1959, in eminent domain proceedings to condemn two contiguous properties of petitioners for the asserted purpose of clearing an alleged blight area, referred to as the Coalport Area, in accordance with an Ordinance and other action of the City of Trenton, New Jersey, and of the Housing Authority of the City of Trenton, a body corporate and politic of the State of New Jersey, authorized to proceed in accordance therewith.

OPINIONS BELOW

No formal opinion was filed in the Superior Court, Law Division, but the Court's views and conclusions are expressed in the record of the argument of the motion for a new trial. (See Appendix for Appellants in the Superior Court, Appellate Division, at pages 220a to 229a, filed herewith.)

The opinion of the Appellate Division is printed in full in the Appendix to this petition at page 1a. It is not officially reported. The judgment is printed at page 8a.

No opinion was rendered by the Supreme Court, but the judgment and decision denying the petition for certification is reported in 33 N.J. Reports, at page 332. It is also printed in full in the Appendix to this petition at page 10a.

JURISDICTION

The judgment of the Supreme Court of New Jersey denying the petition for certification to review the judgment of the Superior Court of New Jersey, Appellate Jurisdiction, which judgment of the Appellate Division affirmed the judgment of the Superior Court, Law Division, is dated October 3, 1960.

By Order of December 30, 1960, the time within which petitioners herein may apply to this Court for a writ of certiorari to review the judgment of the Supreme Court of New Jersey was extended by Honorable William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States, to and including February 28, 1961. Said Order is printed in the Appendix to this petition at page 11a. Each of the respective counsel for the respondent was promptly informed personally of the allowance of said Order, and a true and complete copy thereof was duly served on each pursuant to Rule 34(4), and Rule 33(1), on January 5, 1961, in the manner specified by Rule 4:51 and Rule 4:52 of Civil Practice in the Superior Court of New Jersey.

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 United States Code, Sec. 1257 (3).

QUESTIONS PRESENTED

The questions presented by this petition are:

1. Whether the value of the property taken should have been determined as of 1954, when the City of Trenton made known its definite and positive intention to appropriate it and authorized the plaintiff, the Housing Authority of the City of Trenton, the respondent herein, to acquire it, instead of September 29, 1958, the date of filing the Complaints instituting the actions to condemn it; and is not the trial Court's refusal to so rule and charge the jury a denial of due process of law and of the equal protection of the laws to the petitioners herein, and the taking of their property without just compensation, in violation of the Fourteenth Amendment of the Constitution of the Unied States.

2. Whether the trial Court's ruling permitting the plaintiff, the respondent herein, to determine the value of the properties by a separate valuation of the buildings and the land and then an over-all valuation of the whole, but denying that same right to the defendants, the petitioners herein, and refusing to restrict the plaintiff to the same rule as applied to the defendants, is a denial to the petitioners herein of the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States.

3. Whether the defendants, the petitioners herein, are denied due process of law, the equal protection of the laws, and just compensation for the properties taken, by the trial Court's rulings in excluding evidence by the defendants of:

(a) An agreement between plaintiff and defendants fixing the sum to be paid defendants for

the properties, from which agreement plaintiff withdrew and instituted the actions to condemn;

(b) The cost of maintenance of the buildings as an element in determining their condition and resultant value;

(c) The expense to defendants of moving and disposing of the contents of the buildings;

(d) The fair value of the business terminated by the taking of the properties.

4. Whether the trial Court erred in refusing to grant a new trial on the ground that the verdict was contrary to the weight of the evidence.

5. Whether the trial Court erred in charging the jury that they could make use of their view of the subject premises in forming their judgment of the testimony and in reaching their verdict.

6. Whether the Superior Court, Appellate Division, based its decision and judgment on an erroneous concept of the evidence, and erred in affirming the judgment of the Law Division.

STATEMENT OF THE CASE

Petitioners, who are defendants in the original actions below, own and have interests in two contiguous properties located at No. 616 and No. 618 Perry Street, in the City of Trenton, New Jersey. Respondent, the plaintiff in the original actions, in the exercise of its asserted power of eminent domain, instituted two separate actions in the Superior Court of New Jersey, Law Division, Mercer County,[1] to acquire those two

[1] D denotes Appendix for Appellants filed in the Superior Court of New Jersey, Appellate Division; SA denotes Supplemental Appendix to Petition for Certification filed in the Supreme Court of New Jersey, submitted herewith.

properties, which it sought among a large number of others in the same vicinity for the purpose of clearing an alleged blight area. A separate action was brought as to each property (D1a-1; D12a-1).[2] On the hearings before the Commissioners appointed to determine the value of the properties taken, a separate award was made as to each, $12,800.00 for No. 616, and $30,300.00 for No. 618, a total of $43,100.00 (D9a-25; D20a-28). From those awards appeals were taken by plaintiff (Respondent herein) (D10a-1, D21a-1), and cross-appeals were taken by the answering defendants (Petitioners herein), D11a-1; D22a-1). On the trial of those appeals in the Superior Court, Law Division, with a jury, the separate actions were consolidated for the purposes of the trial (D185a-10; D206a-15), and the jury rendered its verdict accordingly awarding a lump sum of $26,000.00 to the owners for the combined properties (D217a-16), which was $17,100.00 less than the sum awarded by the Commissioners.

An order for judgment in accordance with the verdict of the jury was entered, dated July 2, 1959, filed July 6, 1959 (D23a-1). An order was also entered, dated July 2, 1959, filed July 6, 1959, authorizing and directing the Clerk of the Superior Court to accept payment by plaintiff of said sum of $26,000.00 (D24a-1), which sum was deposited with the Clerk by plaintiff accordingly.

Defendants gave notice of a motion for a new trial on the ground that the verdict was against the weight of the evidence, reserving all objections, exceptions

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[2] Pursuant to the practice and procedure under the New Jersey Eminent Domain Act (N.J.S.A. 20:1-9, P.S. 1953, c. 20, p. 363, and Revised Rules of Civil Procedure 4:92, et seq., and 4:85 et seq., which procedure is judicial and not administrative.

and rights (D24a-25; D220a-25). The new trial was denied and an order was accordingly entered, dated August 4, 1959, filed August 10, 1959 (D25a-10; D229a-20). An objection to the Court's ruling was noted on the record (D229a-21).

An appeal from the judgment of the Law Division was taken to the Appellate Division by defendants, the petitioners herein, because of its contended inadequacy, and because of alleged errors in the course of the proceedings. The appeal was argued in the Appellate Division March 22, 1960, and decided July 5, 1960 (SA1a-15), on which date judgment was entered affirming the judgment of the Law Division (SA9a-9). The opinion of the Appellate Division is printed in the Supplemental Appendix to the Petition for Certification, filed herewith, at pages 1a to 8a, and the judgment at page 9a. They are also printed in the Appendix to this petition at pages 1a and 8a.

The right of further appeal to the Supreme Court of New Jersey, the Court of last resort, depending upon that Court's granting the right by a certification to the Appellate Division (Rules of the Supreme Court of New Jersey, 1:2-1; 1:10-1 to 1:10-4, a petition for certification was duly presented to the Supreme Court by defendants (SA10a-1). (See Petition for Certification with Supplemental Appendix filed herewith.) The petition for certification was denied by the Supreme Court by Order dated October 3, 1960. It is printed in the Appendix to this petition at page 10a.

As stated, supra, by order dated December 30, 1960, Honorable William J. Brennan, Jr., Associate Justice of this Court, extended the time for filing a petition for a writ of certiorari to the Supreme Court of New Jersey to and including February 28, 1961. The pres-

ent petition is hereby respectfully submitted by petitioners accordingly.

A brief summary of relevant events, commencing several years prior to the institution of the condemnation suits, may not be inappropriate. In 1954 steps were taken by both Federal and local authorities to evaluate and evacuate the area involved in the Ogalport Project, and Mr. Vincent P. Bradley, who later became the sole witness for the Housing Authority in its behalf in determining the value of the properties taken, had been retained by both the Federal agency and the Housing Authority to interview the occupants of the area and appraise the value of the properties involved; and commencing in 1954 and finishing in 1956 he made a complete appraisal of the entire area (D35a-12-15). In September, 1955, the governing body of the City of Trenton, by its Resolution No. A3971, approved and affirmed in all respects the report of the Planning Board and its findings determining that the conditions existing in that area constituted a blighted area (D15a-19-26); and thereupon authorized and empowered plaintiff, the Housing Authority of the City of Trenton, to negotiate for the acquisition of all the properties in the area for clearance and later disposition in the exercise of its claimed legal functions (D15a-27-29).

Soon thereafter, the Housing Authority, which, in conjunction with the Federal agency, had been examining and appraising the properties in the area since 1954, negotiated with the owners of the 300 or more properties involved in the clearance project, and began to acquire the properties as early as 1956 (D35a-10), D49a-3). Meantime, occupation, sales, rentals, maintenance, improvements, and business and residential functions and activities waned, diminished, and eventually ceased and vanished.

So that, when plaintiff, the Housing Authority, on September 29, 1958, filed its complaints to acquire the two properties located at No. 616 and No. 618 Perry Street from their owners, the contesting defendants herein, almost all of the structures had been demolished, and but few remained in the devastated area (D169a-10), (D169a-27-30). The subject properties of defendants and a few others nearby were still standing.

The subject premises, in addition to residential facilities in the upper floors, consisted of a retail dry goods and merchandise establishment occupying the entire combined first floor portions of the two properties and portions of the basements underneath, which had been patronized for many years by those who inhabited the region (D44a-20). The Housing Authority, by its act in thus laying waste the entire area, created a situation tremendously disadvantageous to the appearance and superior location of the premises involved, as of the date of filing its complaints, September 29, 1958, which it insists is the date as of which the value must be determined, instead of 1954, when the inevitable demolition and evacuation of the area became an inexorable eventuality. (D28a-9). This view was sustained by the Court's rulings (D30a-36, D31a1-15), (D206a-10; D210a-9-10); and emphasized by counsel for plaintiff in his opening to the jury (D27a-38 to D28a-1 to 15). To those rulings, defendants noted appropriate objections, contending that the value of the properties must be determined as of the time when the governmental authorities first made known their intent to invade and destroy the area, which led to its evacuation and depreciation of values, and not after four years of waiting, while the demolition, destruction, devastation, and exodus progressed.

and thus, by its own action and non-action, claim "profit by its own wrong," in contravention of the universal fundamental principle which holds that such cannot be.

A brief analysis of the testimony of the witnesses may tend to clarify the evidence adduced and simplify the situation presented.

Vincent P. Bradley was the only witness called by the plaintiff. He testified that, in his opinion, the value of 616-618 Perry Street was $22,400.00, sold as one unit. He estimated the value of the building on No. 616 at $7,000.00, and the building on No. 618 at $11,650.00, a total building value of $18,650.00 (D42a-15; D50a-10, 14), but it was his opinion that they should be sold as a unit because of their use (D42a-6).

To support his estimate of $22,400.00 as the total value of the premises he offered four properties—namely 620 and 622 Perry Street (treated as one unit), (D45a-19), 624 Perry Street (D45a-40), 545 Perry Street (D46a-15).

It is respectfully urged that his testimony demonstrates that these properties are in no wise comparable and from no standpoint could be a basis upon which a true value of the subject premises could be determined. 620 and 622 Perry Street had a total lot frontage of only 32 feet in width and a depth of 95 feet (D45a-24) whereas the lot dimensions of the subject properties were 49 feet 5 1/2 inches in frontage and a depth of 95 feet (D42a-8). Moreover, 620 Perry Street was occupied on the first floor as a barber shop with wash room and toilet, renting at $65.00 a month (D53a-27-28). The barber shop had a depth of 24 to 25 feet (D52a-36) and an exterior width measurement of only

14 feet (D52a-24). The premises above the barber shop were occupied by the owner (D53a-29). The interior area of the barber shop thus comprised less than 350 square feet. Considering the yearly rental of the barber shop of $780.00, the yearly rental per square foot was $2.23.

The 622 building was rented on the first floor as a cigar store at a monthly rental of $65.00, (D45a-34). The depth of the store was 23 feet (D53a-7). Although there were rooms behind the store (D53a-7), his testimony was that the $65.00 rental was for the cigar store (D45a-34). The residence above 622 rented for $55.00 per month (D45a-36).

Although the side wall of 620 Perry Street was bulging (D172a-23), Mr. Bradley testified that he could not from his own knowledge state the condition of that westerly wall (D54a-18-20). Yet the property at 620 and 622 Perry Street was purchased by the plaintiff in January, 1958, for $20,000. (D45a-23-24), despite the bulging wall, the bad shape of the back roof and the difference in size of those buildings (D172a-21-23).

Mr. Bradley used as another comparable property the one known as 624 Perry Street. That building was on a lot 18 feet in width, a three story structure being 30 feet deep and a 2 story brick extension 13 x 16 feet and had a store 25 to 26 feet in depth (D53a-9-14). Mr. Bradley testified that he inspected 624 Perry Street in 1954 and learned that the entire building brought $40 a month (D55a-3-6). Despite this very low rental the plaintiff paid $11,000.00 therefor (D46a-11). The properties 620, 622 and 624 Perry Street, having together the same combined width as the subject premises, were acquired by the plaintiff at a combined figure of $31,000.00. Yet, these properties could

be compared in no way favorably either as to size, condition, and usage with the subject premises.

Some pertinent testimony concerning the subject premises follows:

There was an archway between 616 and 618 Perry Street on the first floor, and, as a result, was used as one parcel. (D42a-11-12).

The inside measurements of the store were made by Mr. Wilson O. Bachman, one of the expert witnesses produced by the defendants. Mr. Bachman testified that the first floor of 616 Perry Street had a square foot area of 1225 feet (D120a-22) and the first floor of 618 contained 1743 square feet (D120a-31). Thus, there was an open business area on the first floor of the two properties amounting to 2968 square feet.

It is respectfully urged that a barber shop and a lot 14 feet in width D52a-24) comprising less than 350 square feet and renting for $65.00 per month (D45a-26) and a cigar store of approximately the same area and also renting for $65.00 per month cannot be compared in any way with a well-known retail establishment having an area of almost 3000 square feet as mentioned above. Mr. Bradley admitted in his testimony that "the Finkle store was the only store of any size in the block. This was the only store of its type." (D44a-25-27).

Mr. Bradley testified that 616 had a square foot area of 2492 feet and estimated the value of the building alone as $7,000. (D50a-11). He then testified concerning the condition of 618 Perry Street, stating that it was a brick building, "excepting the sun porch rear 22 x 16 feet, that was frame, second floor." Of 618 Perry Street he stated: "The house part, however, is

in very fine condition and is a tremendous over-improvement for the neighborhood. It has a super-modern kitchen, a tile bath and parquetry floors, oak floors, very nicely planned rooms, and makes a very comfortable residence, which you cannot call an apartment because it is on two floors. It has a sun porch in the rear that can be used as a sleeping porch. It is unheated. And those two floors are very nicely modernized, quite attractive. But, of course, as I said before, a lot of money has been wasted in them because of the over-improvement out of character with the neighborhood" (D44a-3-13). "Well, I would feel that the Finkles have been very happy and comfortable there because they do not live outside of the property. They get up in the second and third floor and they are in another world. And I would think they would be very comfortable." (D45a-7-11).

Further, that the store in 618 "has a depth of about 80 feet and is all on one level, and there is a good full basement. I found an adequate hot-water heating plant, oil-fired, and domestic hot-water supply" (D43a-33-36). He placed a value on this building of $11,650.00 (D50a-14). It had an area of 4150 square feet (D50a-20).

Worthy of note is the evident method by which Mr. Bradley set the relative building values of 616 and 618 Perry Street. His testimony was that 616 had a square foot area of 2492 feet and he placed a value on that building of $7,000.00. If $7,000.00 is divided by 2492 the resultant figure is $2.80 per square foot. Concerning 618 Perry Street he stated the square foot area to be 4150, and the building he valued at $11,650.00. If the same formula is used—namely, dividing $11,650.00 by 4150, the resultant answer would again be $2.80 per

square foot, precisely the identical figure as given per square foot for 616 Perry Street. In view of his own testimony contrasting the condition of 616 with 618 Perry Street, wherein he stated that 616 was in very poor condition (D50a-24) and of frame construction (D50a-29) and had old plumbing and wiring and fixtures (D43a-19) and the apartment was without a central heating plant (D43a-22), whereas 618 was a 3 story brick building, the house part being in "very fine condition" (D44a-3), "a good full basement and an adequate hot water heating plant, oil fired, and domestic hot water supply" (D43a-34-36), and that the Finkles when "in the second and third floor—they are in another world" (D45a-9-10), his arrival at a $2.80 per square foot figure for 616 and the identical per foot valuation on 618 presents a most incongruous picture and is out of all reason. The proportionate value of 618, on his own testimony of the relative conditions of the two, is obviously many times greater than that of 616; and the award of the jury, on his own hypothesis, is shockingly inadequate; and in view of the unimpeached testimony produced in behalf of the defendants-appellants, it is completely without justification.

The per square foot price of $2.80 which Mr. Bradley evidently computed as the sale value of 616 and 618 Perry Street is little more than the $2.23 per square foot gross annual rental that tenants paid on the barber shop and cigar store at 620 and 622 Perry Street.

The only other alleged comparable sale submitted by Mr. Bradley was 545 Perry Street (D46a-15), purchased at a price of $10,000.00 (D46a-23). The property was on a lot 25 x 100 (D46a-15). Although Mr. Bradley testified that the property was in good condition his testimony was contradicted by Mr. Bachman, one of the experts called by the defendants.

Mr. Bachman testified that 545 Perry Street was rejected as a comparable in that he "talked to Mr. O'Donnell who at one time bought this property, and he told me that at the time of the sale it was in very, very bad condition. It is only a 25 x 100 foot lot. It has a three story brick building on it. But again, it did not, because of its size and because of the fact that it was represented to me to be in a very bad condition, I did not use it as a comparable." (D144a-18-24).

Mention might here be made that Mr. Bradley was in the employ of the plaintiff, The Trenton Housing Authority, and in that capacity appraised the entire Coalport area (D35a-12-15). He estimated that there were between 304 and 325 individual parcels in that area (D38a-27). Although he appraised every parcel and had available the information on every one, it is surprising that he failed to present any proper comparable sales. None of the four alleged comparables had a lot 50 x 95, nor could any of his comparables compare favorably in condition, building size or utilization with the subject premises.

Mr. Bradley further stated that the subject properties have been put to the highest and best possible use (D46a-33-36).

He admitted that he was not competent to testify as to the cost of construction because he is not a builder (D51a-12-13).

In contrast to the testimony of Mr. Bradley, the sole witness offered by the plaintiff, defendant produced five witnesses, included among whom were three experts. The principal witness on behalf of the defendants was Mr. Wilson O. Bachman, a licensed New

Jersey real estate broker, an expert of wide experience, whose qualifications were accepted by both the Court and opposing counsel (D119a-16) (D119a-13). Mr. Bachman did not have access to the Coalport files as did Mr. Bradley, who had personally made the appraisal of the 304 to 325 properties in that area (D35a-10-15); (D38a-27). Nevertheless, Mr. Bachman offered as comparable properties: 600 Perry Street, 606 Perry Street, 584 Perry Street, 183-185 Jefferson Street, all of which were in the Coalport area, and 502-10 Perry Street, immediately on the fringe thereof.

Although none of the four properties alleged by Mr. Bradley to be comparable comprised a lot size anywhere near so large as the subject premises, Mr. Bachman offered two comparables, each of which was identical in size and in the same block as the subject properties.

Mr. Bachman emphasized the precise comparability of 600 Perry Street to 616 and 618 Perry Street. He stated that 600 Perry Street was identical in size with the subject property and in the same block (D138a-29-30) (D138a-34-35). At the time of the sale of 600 Perry Street to the Housing Authority the lot contained a small cinder block gas station office, and an island with some gasoline pumps and was used as a gasoline station (D138a-35-39). The building "was in a shambles." He placed no value upon the building nor to the business; yet the Housing Authority paid $30,400.00 for this property. He further testified that that property was "by no means as valuable in its entirety as the subject property because it had no buildings of any value on it." (D139a-19-30). No part of Mr. Bachman's testimony concerning the 600 Perry Street property was in any way impeached by cross-examination.

Mr. Bachman offered as another very important comparable the property known as 606 Perry Street, which was a short distance from the subject properties and in the same block. The lot dimensions (50 x 95) were identical with the subject premises. It had a three story brick building on it and was purchased by plaintiff in July of 1958 for $51,500.00 (D140a-23-27). Mr. Bachman stated that he examined 606 Perry Street in October of 1958. At that time the building was in deplorable condition, the windows were broken, tenants were still in the property but the testimony was to the effect that the building was in a shambles (D140a-19-22). Although the sale to the Housing Authority was consummated in July, 1958, it was left open by the Court for the defendants to show that the conditions at time of purchase in July were the same as in October of 1958 (D141a-15-19). This connecting link was supplied by both Mr. Maurice Finkle (D172a-36 to 173a-12). (D174a-39 to 175a-6), and Mr. Nathan Finkle (D180a-37 to 181a-19), both of whom testified that the condition stated by Mr. Bachman to exist in October of 1958 was the same as July 1958, the time when plaintiff consummated the purchase.

Mr. Bachman further testified regarding 502-10 Perry Street (D125a-30 to 129a-30) which had been sold on December 31, 1956 for $38,750.00 (D129a-10). He testified that the purchaser paid that price solely for the land, inasmuch as the buildings were valueless and a burden to the land, and were demolished shortly thereafter (D126a-5) (D128a-24, 38), and that the expense of the demolition was an additional cost to the purchaser. Its dimensions were 100 x 100 feet (D129a-13).

He also considered No. 584 Perry Street another comparable sale (D141a-20). It was located on the

northwest corner of Perry and Southard Streets, on the same side of Perry Street as the subject properties, and its Southard Street side directly opposite the No. 600 Perry Street property, supra. His testimony was to the effect that this building was on a lot 24.9 x 78 feet in area (D141a-28); that it contained a store and some rooms; that it had a pipeless heater servicing only the store and no central heating system (D142a-7-9). The frontage on Perry Street was only one-half that of the subject properties, the depth of the lot only 78 feet, yet the Housing Authority paid $19,000.00 for the property (D141a-36).

Mr. Bachman also considered as a comparable the Galilee Baptist Church property, located at No. 183-185 Jefferson Street. It was on Jefferson Street, one of the poorest in the redevelopment area. The buildings there were "very, very bad" (D142a-14-22). The church building, which manifestly would not have a sale value for ordinary purposes, and was suited only for use as a church edifice, occupied a lot 45.8 feet in frontage x 70 feet in depth (D142a-17), which was a smaller area than the subject premises, which have a combined area of 49.5 1/2 x 95 feet (D42a-8). He further testified that "just before the acquisition by the Housing Authority the church building was in poor condition and the interior, the plaster was off in spots and the building was much in need of repair and maintenance". (D162a-7-11). It should be noted that the photograph of the church, though admitted in evidence (Exhibit P-2), (D183a-5), was taken in 1954 (D216a-7), did not reflect the condition of the property at the time it was purchased by the Housing Authority (D160a-38). This was admitted in evidence despite the Court's ruling that defendants' subject properties had to be judged as of the date when the complaint was

filed, September 29, 1958, and that they could not be valued as of an earlier date when the project became known and the depreciation and exodus commenced, supra. The price paid for the church property was $105,000.00 (D142a-39).

On cross-examination, Mr. Bachman testified that the subject premises had an estimated net income value of $5,100 per year, representing a 9% return on $55,200.00, (D163a-34-38), which was his estimated market value of the combined subject properties as of the date of the filing of the complaint, September 29, 1958 (D164a-11). He also testified that the store portion would produce a gross yearly rental of $5200.00 (D164a-17) and the apartment at No. 618 a monthly rental of $150.00, a yearly income of $1,800.00 (D164a-26) thus equalling a total gross annual income of $7,000.00. When taking into account that the open store area of both premises comprised 2968 square feet Mr. Bachman's testimony that this area would produce a gross rent of $5200.00 makes the square foot price $1.75 per year. This figure is considerably less than the $2.23 per square foot yearly rental derived from the barber shop and cigar store at 620-622 Perry Street, respectively, supra. Referring to 618 Perry Street, Mr. Bachman further testified as follows:

> "618 is a very fine building. The first floor store shows need of decoration, painting to make it more cheerful. The second and third floors of 618 Perry Street are in excellent condition and certainly a very highly desirable and completely acceptable living apartment, in very good shape." (D121a-8-13).

Mr. Bradley's testimony concerning the residence at 618 corroborates that of Mr. Bachman (D44a-3-11).

Mr. Bachman also testified that, in stating his figure of $55,200.00 as that which a willing buyer would pay a willing seller, his price did not reflect any loss of business or loss due to the delay of the Housing Authority in taking possession of the subject properties (D153a-36; 154a-25-29). Incidentally, Mr. Bachman testified that the subject premises were located in an excellent business location in the most densely populated area in the City of Trenton (D125a-10-17). The Court, however, ruled out his statement that delay of the Housing Authority was an element of additional damage which Mr. Bachman did not include in his figure. An appropriate objection to the Court's ruling was noted (D154a-35).

It is respectfully submitted, therefore, that Mr. Bachman's testimony, in all respects, was clear and convincing; his permitted comparables were apropos and particularly applicable; his competency was accepted by the Court and opposing counsel; he was not in anywise impeached; and no rebuttal of his testimony was offered by plaintiff.

On behalf of the defendants, Mr. William McCarthy (D61a to 111a), a contractor and builder, as well as a real estate broker of many years experience, was first qualified as such, and by his testimony defendants sought, in refutation of Mr. Bradley's testimony, and also to sustain his own ultimate opinion of value, to show his valuation of the buildings on Nos. 616 and 618 Perry Street, the subject properties. But, by the Court's ruling, he was not permitted to show such value, and was confined to testimony solely as to the market value of the properties as between a willing seller and a willing buyer. He was not permitted to show the bases upon which he reached that opinion.

To this ruling an exception was noted (D71a-34). However, Mr. Bradley had based his opinion of value exclusively, except for the alleged comparables noted, upon the value of the buildings, plus an increment or enhancement flowing from a hypothetical sale of the combined properties as a single unit rather than separately (D50a-38, D51a-3); notwithstanding his admission of lack of qualifications regarding construction (D51a-10). Upon the ruling by the Court, a motion was made to strike Mr. Bradley's testimony of value based upon the building estimates, but that motion was denied. Appropriate objection was noted (D71a-34) supra. As it stands, therefore, Mr. Bradley's valuations are permitted to stand, upon a basis of separate value of the buildings, with an enhancement by a hypothetical sale as one unit; while Mr. McCarthy's proposed testimony upon the basis of separate value of the buildings as an element in forming his opinion of the over-all value, is excluded. Being thus restricted, Mr. McCarthy testified to a value of the combined properties of $68,578.00 (D90a-38, D93a-23). He further testified that No. 616 required only minor repairs, most of which was in the nature of painting, and that No. 618 was in excellent condition and state of maintenance D84a-30-33, D85a-26-27).

Mr. Matthew DiNola (D112a to D116a), a builder of wide experience, who was also produced by the defendants to show the value of the buildings, but whose testimony was confined to the limits of the Court's ruling aforesaid, testified as follows with reference to 618 Perry Street:

> "Q. What about 618? What did you observe there? What is that constructed of? A. Well, your 618 is 95% masonry which consists of stone foundation, concrete floor, 12 inch brick wall on

the first floor, 8 inch brick wall on the second floor with the exception of maybe 15 by 21 on the second floor, the sun porch, but the rest is all masonry, and it is in very excellent condition. * * * In general speaking of the building of construction, as far as I am concerned is in excellent condition structurally, it is from standpoint of masonry or carpentry."

Mr. DiNola also testified that 616 Perry Street required merely minor repairs to restore the building to good condition (D114a-3-30).

The only questions asked of Mr. DiNola on cross-examination were the date of his inspection of the subject premises and the time spent thereon (D116a-30-39).

Nathan N. Finkle, a defendant owner, testified that he resided at 618 Perry Street from the date of his birth until his marriage on January 29, 1950, and knew from his own knowledge that the living quarters were always very substantially maintained (D180a-21-29).

There was no cross-examination whatever of Nathan N. Finkle's testimony—nor was any rebuttal offered thereto.

Maurice A. Finkle, one of the owners, testified that he still resided and has resided at 618 Perry Street since his birth in 1900 (D166a-20). "We always maintained the property. We spent a lot of money." (D171a-38). He was not permitted to state the approximate expenditure (D176a-34, D177a-30). Exception was noted.

Regarding the apartment above 616 Perry Street, Mr. Finkle stated:

The "tenant was told to get out by one of the members of the Housing Authority." (D170a-19-21).

> "Q. Have you done anything towards maintenance since the last tenant moved out? A. You mean 616?
>
> Q. 616. A. Upstairs, no.
>
> Q. Why not? A. Because we knew that we couldn't get a tenant there under the conditions. The redevelopment was taking place and we couldn't expect a tenant to move in there and expect the tenant to move out soon after." (D171a-11-18).

Thus plaintiff created a situation whereby it was made impossible for defendants to obtain a tenant for the apartment above 616, and a long time thereafter seeks to diminish the value thereof because 616 had not been maintained.

As an owner, Maurice A. Finkle was competent to testify concerning the condition of his own property (*P.R.R. v. Root*, 53 N.J.L. 253).

He testified that 620 and 622 could compare in no way with 618, whether as to size, condition, etc. He stated, without any refutation whatever by plaintiff, that the roof in the rear of 620 was in bad shape and the side wall was bulging. (D172a-21 to 24).

Relative to the condition of 606 Perry Street, one of the comparables offered by defendants, the court asked him to testify generally (D173a-6). Mr. Maurice A. Finkle stated: "I would say very poor condition, generally." (D173a-11).

Mr. Finkle further testified that the business commenced to decline when families started to move away since 1954, and at the time of hearing the business practically ceased due to the general exodus of more

than 400 families (D168a-20; D169a-3 to 6). This was recognized and admitted by the Court (D169a-20; D176a-20 to 24); but refused to charge the jury defendants' request regarding it (D214a-35 to D215a-3; D219a-No. 1).

He also testified that the bulldozer used in demolition of the adjacent building caused damages to 618 (D175a-19 to 21).

Although Mr. Finkle knew the cost of moving (D175a-35), the Court did not permit him to testify thereto (D175a-38; D176a-29).

An objection was noted on the record (D176a-31).

It is respectfully submitted that the testimony of Maurice A. Finkle was in no way impeached on cross-examination (D178a and D179a).

No rebuttal of any kind was offered by plaintiff to any of the defendant's testimony.

REASONS FOR GRANTING THE WRIT

The writ of certiorari should be allowed in the present case because:

1. The value of the property taken should be determined as of a date as early as 1954, or even prior thereto, and certainly as early as August 18, 1955, when the Planning Board held its public meeting, or by September 1, 1955, when the City of Trenton, by its Resolution No. A3971, designated the so-called Coalport Area as a blighted area, and the Court's rulings adverse thereto and the fixing of the valuation date as of September 29, 1958, the date of filing the Complaint, is a denial to defendants of due process of law and the equal protection of the laws, and the taking of their property

without just compensation, in violation of the Fourteenth Amendment of the Constitution of the United States and the law of the land.

2. The Court's ruling permitting plaintiff to establish its asserted value of the property taken by one procedure but denying that same procedure to defendants, and then refusing to strike plaintiff's testimony is a denial to defendants of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

3. The defendants were denied due process of law, the equal protection of the laws, and just compensation for the property taken, in violation of the Fourteenth Amendment of the Constitution of the United States, by the Court's ruling denying defendants' right to show and establish:

a. An agreement between plaintiff and defendants of the sum to be paid defendants for the property taken, from which plaintiff unjustifiably withdrew and instituted the actions to condemn;

b. The amount expended in maintenance of the buildings as an element in establishing their good condition and resultant value;

c. The expense to defendants of moving and disposing of the contents of the buildings, which had contained a going business as well as residences.

d. A fair compensation for the loss of the business, which was destroyed by the taking by plaintiff.

4. The trial Court erred in refusing to set aside the verdict of the jury and grant a new trial which verdict

clearly was not only contrary to the weight of the evidence, but which has no direct evidence to sustain it.

5. The trial Court erred in charging the jury that they could make use of their view of the subject premises on June 25, 1959 (when the Coalport Area was devastated), in forming *their judgment of the testimony* and in determining their verdict.

6. The Superior Court, Appellate Division, erred in affirming the judgment of the Law Division, and palpably based its decision and judgment on an erroneous concept of the evidence.

7. The case presents important questions respecting standards for valuing property taken for public use, and there may be an apparent conflict in one of this Court's decisions respecting the same.

In considering these reasons it should be noted that the present proceedings are instituted pursuant to the New Jersey Eminent Domain Act (N.J.S.A. 20:1-1, et seq., P.L. 1953, c. 20, p. 363, and R. Rules of Civil Procedure 4:92, et seq., and 4:85 et seq.) which procedure is judicial and not administrative, and is commenced by the filing of a Complaint in the Superior Court of New Jersey Law Division. Thereafter it proceeds as in all other civil actions.

It should also be noted that by the 1947 Constitution of New Jersey, Art. 6, Sec. III, Par. 4, (N.J.S.A. "Constitution," p. 549), it is provided that (superseding the former independent equity Court of Chancery and the Courts of Law):

> "Subject to rules of the Supreme Court, the Law Division and the Chancery Division shall each exercise the powers and functions of the other division when the ends of justice so require, and legal and equitable relief shall be granted in any

cause so that all matters in controversy between the parties may be completely determined."

"It is moreover a sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned." *Broom's Legal Maxims* (9th ed.), p. 199.

And Equal Justice Under Law is the basic principle of our Nation.

REASON I

The basic philosophy of eminent domain since Runnymede, and the constitutional guarantees protective of the owner's rights of private property, are clearly and forceably expressed by Justice Douglas in *United States* v. *Causby*, 328 U.S. 256 (1946), where he states, at page 261 et seq., that:

"* * * For the United States conceded on oral argument that if the flights over respondents' property rendered it uninhabitable, there would be a taking compensable under the Fifth Amendment. It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken. *United States* v. *Miller*, 317 U.S. 369. Market value fairly determined is the normal measure of the recovery. *Id.* And that value may reflect the use to which the land could readily be converted, as well as the existing use. *United States* v. *Powelson*, 319 U.S. 266, 275, and cases cited. If by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete.[a]

[a] "The destruction of all uses of the property by flooding has been held to constitute a taking. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; *United States* v. *Lynah*, 188 U.S. 445; *United States* v. *Welch*, 217 U.S. 333."

See also, *United States* v. *Cress*, 243 U.S. 316 (1917), where Jus-

> It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it.
>
> "We agree that in those circumstances there would be a taking."

And, in *United States* v. *General Motors Corp.*, 323 U.S. 373 (1944), Justice Roberts, at page 378, stated that:

> "The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."

And, in *United States* v. *Miller*, 317 U.S. 369 (1942), supra, Justice Roberts also points out, at page 373, that:

> "* * * private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken."

In the *Miller* case, Congress authorized the project involved in August 1937. On December 14, 1938 the United States filed a complaint in eminent domain in the United States District Court against the respondents whose lands were thereby to be acquired. "The action was tried to a jury. * * * Each witness was asked

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tice Pitney, at page 328, stated that: "* * * it is the character of the invasion not the amount of damage done from it, so long as the damage is substantial, that determines the question whether it is a taking."

to state his opinion as to market value of the land taken as at December 14, 1938, the date of the filing of the complaint. Government counsel objected to the form of the question on the ground that, as the United States was definitely committed to the project August 26, 1937, the respondents were not entitled to have included in an estimate of value, as of the date the lands were taken, any increment of value due to the Government's authorization of, and commitment to, the project. The trial court sustained the objection and required the question to be reframed so as to call for market value at the date of the taking, excluding therefrom any increment of value accruing after August 26, 1937, due to the authorization of the project. * * *"

The respondents, claiming they were entitled to the increase in the value of their property by reason of the effect of the project in the period intervening between the taking and the filing of the complaint, appealed, contending that the trial court erred in ruling, and charging the jury, that, "in arriving at market value as of the date of taking, they should disregard increment of value *due to the initiation of the project* and arising after August 26, 1937. * * *

"The Circuit Court of Appeals reversed the judgment." * * *

In reversing the judgment of the Circuit Court of Appeals and affirming that of the District Court, Justice Roberts stated, at page 375, that:

> "Since the owner is to receive no more than indemnity for his loss, his award cannot be enhanced by any gain to the taker. * * *
>
> "There is, however, another possible element of market value, which is the bone of contention

here. Should the owner have the benefit of any increment of value added to the property taken by the action of the public authority in previously condemning adjacent lands? If so, were the lands in question so situate as to entitle respondents to the benefits of the increment? * * *

"The project, from the date of its final and definite authorization in August 1937, included the relocation of the railroad right-of-way, and one probable route was marked out over the respondents' lands. This being so, it was proper to tell the jury that the respondents were entitled to no increase in value arising after August 1937 because of the likelihood of the taking of their property."

If the sovereign be thus immune from an increase in value because of its action, *a fortiori*, with stronger reason, the citizen should be immune from a decrease in value because of the sovereign's action.

That no man, not even the sovereign, should profit by his own wrong, is a universal rule of action, binding on all.

The Housing Authority takes no action, after having once agreed with the owners and then backed out, until the area is in shambles and the properties' market value is adversely affected accordingly, and then contends that that adversely affected value should be the criterion of value in determining the "just compensation" to be paid the owner!

The same principle is unequivocally applied in *Grosso* v. *Board of Adjustment of Millburn Township*, 137 N.J. Law, 630, 61 Atl. 2d, 167 at 169 (Sup.Ct. 1948), where the existing "official map" was changed by showing an extension of Essex Street through and wholly occupying the parcel of land in question, which

"placed the entire property * * * in the bed of the proposed street," for future use as a public street. Justice Heher, speaking for the former Supreme Court, said:

> "It was plainly not open to the defendant municipality, in the exercise of the planning power, to dedicate the locus to highway uses on the 'official map' and thereby deprive the landowner of all use thereof, without making compensation, until the municipality was prepared to lay out the street. That would constitute a palpable deprivation of property without due process of law. The amendment of the ordinance does not purport to be the exercise of the power of eminent domain. Rather it is deemed to be a valid regulation under the police power. The Board of Adjustment erroneously concluded that the ordinance served to deprive prosecutor of the use of his land. Such interference with the landowner's exclusive right to the possession, use and enjoyment of his property would infringe the cited constitutional guaranties. This would be a public use for which private property is subject to appropriation only under the power of eminent domain. Private property may not be confiscated under the guise of police regulations."

And in the appeal of Lakewood Gardens, Inc., 381 Pa. 46, 112 Atl. 2d 135, at 138 (Sup.Ct. Pa., 1955), the Court stated that:

> "The resolution of condemnation for the original turnpike location was adopted by the Commission on October 10, 1938, and we know of no instance where it was contended that the date of the resolution of condemnation was not also the date of the taking. On the contrary, on three separate occasions we expressly referred to the date of the Commission's 1938 resolution of condemnation as being the time of the taking or

appropriation: see Hunter v. McKlveen, 353 Pa. 357, 45 A.2d 222; Appeal of Pennsylvania Turnpike Commission, 351 Pa. 139, 40 A.2d 404; and In re Pennsylvania Turnpike Commission Land Condemnation Case, 347 Pa. 643, 32 A.2d 910. * * *

"Reasoning from decisions in eminent domain cases arising under other statutes, we think it is both logical and just to conclude that the Commission's formal adoption of the condemnation resolution which set forth the location of the proposed turnpike extension by description and plans, approved by the Governor and the Department of Highways, constituted an appropriation of the indicated properties. In Appeal of City of Philadelphia, 364 Pa. 71, 70 A.2d 847, the question was as to the effective date of the taking under an ordinance of the City condemning certain land for park purposes. The City later attempted to abandon certain of the described lands. We held that the taking had occurred when the ordinance was enacted and the City could not thereafter abandon the condemnation. In the course of our opinion we said, in 364 Pa. at page 73, 70 A.2d at page 848, —'The ordinance was no mere authorization to institute proceedings to condemn. It was the condemnation. Cf. Danforth v. United States, 308 U.S. 271, 286, 60 S.C. 231, 84 L.Ed. 240. * * * The ordinance was intended to, and by its own force did, effect the condemnation; the direction respecting the assessment of the damages was but incidental to the principal undertaking of the ordinance: Smedley v. Erwin, 51 Pa. 445, 451.' In Shields v. City of Pittsburgh, 201 Pa. 328, 331, 50 A. 820, 821, it was held that where a city has by ordinance appropriated land for park purposes but does not actually enter thereon until later, the date of the taking, after there is an actual entry, relates back to the date of the ordinance. The Shields case cited Witman v. City of Reading, 191 Pa. 134, 143, 43 A. 140, and approvingly quoted therefrom as fol-

lows: "By actual opening of and construction of the street, the date of taking relates back to the date of the ordinance adopting the route. This ordinance warned plaintiffs to stop their improvement. The construction of the street was the consummation of the purpose manifested by the constructive appropriation." Again, in Jury v. Wiest, 326 Pa. 554, 193 A 5, the date of a school board's resolution condemning certain property was the date of the appropriation. It was there recognized that it was not necessary for the school directors to take physical possession of the land in order to effectuate the condemnation."

We desire to emphasize the case of *State* v. *Jones*, 27 N.J. 257, 142 Atl. 2d, 232 (1958), where Justice Jacobs, at pages 261-264 of the Supreme Court report, pages 234-236 of the Atlantic 2, states clearly the rule that should prevail in the precise situation in the present proceedings. There, at page 262 of the Supreme Court report, the pith of the rule is stated to be that,—

"If, after the taking and before the condemnation action, the property is reduced in value because of alterations by the Commissioner or otherwise, the condemnee would justly be entitled to the higher valuation as of the date of taking; this is the view which prevails generally throughout the country (3 Nichols, Eminent Domain § 8.5(1) (3d ed. 1950)), and it may well be compelled by the constitutional guaranty of just compensation."

And further, at page 263, that,—

"The respondents suggest that the foregoing views may be applicable in equity but not at law, and they cite Doremus v. Mayor, etc., of City of Paterson, 73 N.J. Eq. 474, 501 (Ch. 1908), and Trimmer v. Pennsylvania P. & B. Railroad Company, 55 N. J. L. 46, 49 (Sup. Ct. 1892). In view

> of the changes wrought by our 1947 Constitution the suggested distinction has lost whatever force it may have had; and while R. S. 20:1-9 does refer to the fixing of compensation as of the date of the filing of the condemnation petition (now complaint —R. R. 4:92-1) it would seem that, in the light of the constitutional provision for just compensation, the introductory portion of R. S. 20:1-1, and the terms of R. S. 27:7-22, it may fairly be considered as not controlling where there has been a taking prior to the condemnation action and an intervening change in the condition of the property."

And while it was held in the *Jones* case that there had not been a prior taking, still in the present case under review there clearly was a prior taking as early as 1954 or 1955, accompanied by a devastation and abandonment of the area and consequent depreciation in values and ceasing of residential and business activities when the complaints were filed on September 29, 1958, as discussed fully, *supra*.

Plaintiff should not be permitted to profit or obtain an advantage by its own delay.

Defendant's Request to Charge No. 2 (D219a-15), which epitomizes the principle involved, was refused by the Court. Exception was duly noted. (D214a-25 to D215a-5).

It is respectfully submitted that by the Court's rulings in this respect defendants clearly were denied due process of law, the equal protection of the laws, and just compensation for their property taken.

REASON II

In reply to questions on direct examination as to whether Mr. Bradley, plaintiff's only witness, made separate valuations of No. 616 and No. 618 Perry

Street, his answers were that, "If I were to value it separately, I would simply take about one-half of the value of the land, that I felt it was worth," and then put on the building $7,000.00 on No. 116, and $11,650.00 on the building on No. 118 (erroneously stated first as $16,500.00, but later corrected (D42a-17), a total of $18,650.00 for the two buildings (D42a-16, 17, 18, 40, D43a-1); that in his "opinion the property should be sold as one parcel since it had the advantage of a frontage of 49 feet 5 1/2 inches by 95 feet" (D42a-6); and "what I could sell these properties for as one unit was the total price of $22,400." (D42a-33, D41a-28). And on cross-examination he reiterated the respective separate building valuations of $7,000.00 on No. 616, and $11,650.00 on No. 618, if sold "in conjunction" or "jointly" with each other (D50a-37, D51a-1). (See also D187a-8 to 26).

On behalf of the defendants, Mr. William McCarthy (D61a to 111a), a contractor and builder, as well as a real estate broker of many years experience, was first qualified as such, and by his testimony defendants sought, in refutation of Mr. Bradley's testimony, and also to sustain his own ultimate opinion of value, to show his valuation of the buildings on Nos. 616 and 618 Perry Street, the subject properties. But, by the Court's ruling, he was not permitted to show such value, and was confined to testimony solely as to the market value of the properties as between a willing seller and a willing buyer. He was not permitted to show the bases upon which he reached that opinion. To this ruling an exception was noted (D71a-34). Clearly, the willing seller and buyer rule could have no bearing as of September 29, 1958, when the area was devastated. However, Mr. Bradley had based his opinion of value exclusively, except for the alleged com-

parables noted, upon the value of the buildings, plus an increment or enhancement flowing from a hypothetical sale of the combined properties as a single unit rather than separately (D50a-38, D51a-3); notwithstanding his admission of lack of qualifications regarding construction (D51a-10). Upon the ruling by the Court, a motion was made to strike Mr. Bradley's testimony of value based upon the building estimates, but that motion was denied. Appropriate objection was noted (D71a-34) supra. As it stands, therefore, Mr. Bradley's valuations are permitted to stand, upon a basis of separate value of the buildings, with an enhancement by a hypothetical sale as one unit; while Mr. McCarthy's proposed testimony upon the basis of separate value of the buildings as an element in forming his opinion of the over-all value, is excluded. Being thus restricted, Mr. McCarthy testified to a value of the combined properties of $68,578.00 (D90a-38, D93a-23). He further testified that No. 616 required only minor repairs, most of which was in the nature of painting, and that No. 618 was in excellent condition and state of maintenance (D84a-30-33, D85a-26-27).

That defendants' counsel did not object when plaintiff's witness, Mr. Bradley, used the method of separate valuation of buildings and land (D42a-15-18) and then the over-all final estimate of value, is due to the fact that he used the accepted method in reaching his conclusion of value. Later, however, when the same method was sought to be availed of by defendants (D70a-25-28) (D68a-15, et seq.), plaintiff objected that it (his own method) was improper, the Court sustained his objection, and defendants were precluded from following it. Then it was that the objection to plaintiff's improper use of the method first became an

open question (D74a-15-17) and defendants promptly availed themselves of their first opportunity to so object to Bradley's testimony, and moved to strike it (D71a-19-21). (D71a-27-29) deeming it objectionable when offered by plaintiff if objectionable when offered by defendants. That this was the appropriate action at that posture, see *Prout* v. *Prout*, 82 N.J. Law 537 (E. & A. 1911). The Court, however, refused to strike plaintiff's testimony (D71a-30; D71a-33) though ruled improper as to defendants, and excluded defendants' precisely similar testimony as improper. And now, plaintiff's counsel assert that Bradley's testimony as to the value of the buildings (though asserted to be erroneous and illegal when offered by defendants) should stand, but that defendants' precisely similar testimony (though unquestionably correct and legal) should be excluded.

And it should be noted that if this evidence of Mr. Bradley were to be also stricken as improper and illegal, there is practically no competent evidence in the case to sustain plaintiff's claim of value.

Mr. DiNola's testimony was also likewise limited (D113a-30-34).

That the Court erred in thus ruling is borne out by numerous authorities. In *Morrell* v. *Preiskel*, et al., 74 Atl. 994, 995 (Sup. Ct. 1909), it is stated that:

"* * *

"The defendant called as a witness Thomas McMahon, one of the members of the board of tax assessors of the city of Pasaaic, for purposes of proving the value of the premises. He expressed the opinion that they were worth $10,000. He was then asked how he arrived at that value, and he stated that he did so by ascertaining the value of

> the land and of the building, and was about to give his opinion as to the value of each when he was interrupted by counsel for the plaintiff, and the court refused to permit him to testify upon this point. This ruling of the court was also made the subject of exception, and is assigned for error. We think the testimony was wrongly excluded. Not only is it, as a general rule, proper to permit an expert testifying to the value of improved property to state how he makes up his valuation, but on the present case it was particularly important that the jury should know how much of the value which existed in the property was attributable to the land, and how much to the building, in determining the extent of the depreciation in the value of the whole property caused by the presence of the sewer. For this reason also the judgment under review should be reversed."

See also *Goodman* v. *L.V.R.R.*, 82 N.J. Law 450, affd. 82 N.J. Law 527 (E. & A. 1911); *Panagoulis* v. *Philip Morris Co.*, — N.H. —; 68 Atl. 2d 672 (Sup. Ct. 1949); *Wigmore on Evidence* (3d. ed.), Vol. 2, p. 644, Sec. 56, page 759, Sec. 655.

In *Hill* v. *Carter*, 16 N.J. Law 87 (Sup. Ct. 1837), the Court stated that:

"Whatever a plaintiff may prove, the defendant may disprove."

And in *Lake Roland El. Ry. Co.* v. *Weir*, 86 Md. 273, 37 Atl. 714, 716 (Ct. App. 1897), the Court stated that:

> "If the irrelevant testimony is offered by one party, the other side should object to it; and if it be given before its irrelevancy is apparent, the court should strike it out on proper application."

To like effect in *Prout* v. *Prout*, 82 N.J. Law 537 (E. & A. 1911), supra. This course was taken by defend-

ants' counsel, *supra*. But he had made no objection to the form of the plaintiff's testimony when offered, because that was in the approved form, *supra*.

See, also, to like effect, *Stein* v. *Schmitz*, 137 N.J. Law 725 (E. & A. 1948), and cases cited; *Jenness* v. *Simpson*, 84 Vt. 127, 78 Atl. 386 (Sup. Ct. 1911); *Budd* v. *Meriden Elec. Co.*, 69 Conn. 272, 37 Atl. 686 (1897); *Orr* v. *Clark*, 62 Vt. 136, 19 Atl. 929, 930 (Sup. Ct. 1890); *Vermont Farm Mach. Co.* v. *Batchelder*, 68 Vt. 430; 35 Atl. 378, 381 (Sup. Ct. 1896); *McElheny* v. *Pittsburgh &c. Ry. Co.*, 147 Pa. St. 1; 23 Atl. 392 (Sup. Ct. 1892); *Gorsuch* v. *Rutledge*, 70 Md. 272, 17 Atl. 76 (Ct. App. 1889); *Panagoulis* v. *Philip Morris Co.*, — N.H. —, 68 Atl. 2d, 1949), *supra*; *Dyer* v. *Fredericks*, 63 Me. 173 (Sup. Jud. Ct. 1874); *Hatch* v. *Brown*, 63 Me. 410, 418 (Sup. Jud. Ct. 1874).

It is respectfully submitted that the trial Court's ruling in this respect is a clear denial of the equal protection of the laws.

The Court, however, permitted plaintiff to show a photograph of Galilee Church taken in 1954 to justify its acquisition in 1957 for $105,000.00 when its condition was "very, very bad", thus again allowing plaintiff to prove the precise right denied defendants regarding their property as of 1954, discussed *supra*. (D142a-14-30; D182a-20-40).

REASON III

a. Defendants sought to introduce evidence to show that an agreement had been reached previously by the Housing Authority with defendants and the price offered and accepted, but from which the Housing Authority had withdrawn after the settlement papers had been submitted to defendants for signature. This, however, was interrupted by objection of counsel for plaintiff as immaterial, and the objection was sustained

by the Court. Objection to the ruling was noted. (D173a-13 to 40).

It is respectfully submitted that defendants had a clear right to show the transaction as an admission of value by plaintiff. There was no assertion that those negotiations were without prejudice.

b. Defendants also sought to introduce evidence to show the approximate cost of maintenance of the property over the years. The testimony is replete with references to the fine condition of the property, particularly No. 618 Perry Street, and the expense of maintenance and upkeep was a convincing element in demonstrating and buttressing that fine condition, though not for claiming specific reimbursement for it, and to that end was clearly relevant and competent. Objection to the Court's ruling excluding it was noted (D176a-34 to D177a-33).

c. Taking into consideration the extent of the occupancy of the business conducted in the store area of the property, and the obvious and palpable expense which the moving of the contents would involve, defendants should be allowed reimbursement by plaintiff for that cost, because plaintiffs taking of the property and the consequent eviction of defendants by reason thereof constitutes the proximate cause of the moving expense.

United States v. *General Motors Corp.*, 323 U.S. 373 (1944), and cases cited. *North Coast R. Co.* v. *A. A. Kraft Co.*, 63 Wash. 250, 115 Pac. 97 (Sup. Ct. 1911) at 101, 102; *State* v. *Hudson Service Center, Inc.*, 46 N.J. Super. 125 (App. Div. 1957), at p. 134; *New Jersey Highway Authority* v. *Rudd*, 36 N.J. Super., at page 5, 114 Atl. 2d at page 723.

There can be no doubt of the effect of the taking on the business conducted by defendants. It gradually declined and eventually ceased. (D168a-20 to D169a-32). The inference from the evidence is inescapable. Defendants were entitled to have the jury consider that loss as an element of compensation, but the Court refused to charge the jury to that effect. See Request to Charge No. 1 (D219a-1). See, also, *United States* v. *Causby, supra; United States* v. *General Motors Corp., supra. Lenzner* v. *City of Trenton*, 22 N. J. Super. 415 (Law Div. 1952); 29 N. J. Super. 514; N. J. 465.

REASON IV

A further review and analysis of the evidence (see review, supra) would be deemed not only unwarranted but unjustifiable. It is respectfully submitted that the record shows indisputably that the jury completely disregarded the unimpeached testimony adduced by defendants and rendered a verdict which indicates that they picked the amount of the award at random, not only not in accord with the evidence of defendants but also at variance with that of the plaintiff. Such a verdict has no basis to support it nor upon which to stand, and is clearly the result of mistake, passion, prejudice, or compromise, either of which is condemned as a denial of justice, and is a ground that warrants the setting aside of the verdict, and a justification for reversing the Court below in denying defendants' application for a new trial. (D229a-20)

The jury cannot simply set up its own idea of the situation involved and disregard the unimpeached and unequivocal evidence presented. These principles are elementary and should not require further elaboration.

The governing principles are clear and well established.

"The burden of proof is on the plaintiff and does not shift."

Hughes v. *Atlantic City & S. R. Co.*, 85 N.J. Law 212, 89 Atl. 769 (E. & A. 1914); *Neibel* v. *Winslow*, 88 N.J. Law 191, 95 Atl. 995 (E. & A. 1915).

"Unless circumstances control, when witnesses are equally credible, the greater number must control."

Katzenbach v. *Holt*, 43 N.J. Eq. 536, 12 Atl. 383 (Chy. 1887); *Blenderhan* v. *Price*, 2 Atl. 812 (Chy 1886). *Kentner* v. *Kline*, 41 N.J. Eq. 422; 4 Atl. 781 (Chy. 1886).

See also, *Swanson* v. *Wiesenfeld*, 24 N.J. Super. 576 (App. Div. 1953).

N. J. Flax Co. v. *Mills*, 26 N.J. Law 60 (Sup. Ct. 1856), where the Supreme Court stated that:

"The jury are the judges of the weight of evidence, but they have no right to disregard competent evidence that is unimpeached." * * *

"The verdict therefore as rendered cannot stand."

Barnes v. *Kinnicut*, 33 N.J. Law 152 (Bergen Dist. Ct. 1909), and cases cited.

And in *Hager* v. *Weber*, 7 N.J. 201, 210 (1951), the present Supreme Court crystalized the rule and stated that:

"As respects the appellate corrective process there is no essential difference between a verdict that comes from misdirection, and a verdict that constitutes a palpable perversion of the jury function. A verdict that rests upon testimony competent to sustain the inference implied in such a finding is ordinarily conclusive, *e converso*, it is not."

In *Juliano* v. *Abeles*, et al., 114 N.J. Law 510, 177 Atl. 666 (Sup. Ct. 1935), it was stated that:

> (Atl. Syl. 8) "Where case exhibits compromise verdict on fundamental issue of liability, the error taints the whole verdict, and a new trial of the entire issue is required. (Supreme Court Rules 122, 123)."

See also, *Bowen* v. *Healey's, Inc.*, 16 N.J. Misc. Rep. 113, 197 Atl. 655 (Sup. Ct. 1938).

Barry v. *P.R.R. Co.*, 65 N.J. Law 407, 47 Atl. 464 (Sup. Ct. 1900).

Vol. 21 *West's N.J. Digest*, "*New Trial*," pp. 262-265.

Fisch v. *Manger*, 24 N.J. 66 at 79 (1957), which follows *Julians* v. *Abeles, supra;* and where Justice Jacobs, speaking for the present Supreme Court, at page 80, states that:

> "Notwithstanding earlier doubts (*Nelson* v. *Eastern Air Lines, Inc.*, 128 N.J.L. 46, 55 (E. & A. 1941), there is now no question as to the power of our appellate courts to reverse a trial court's refusal to grant a new trial (whether or not conditioned on *remittitur* or *additur*) where it is satisfied that there has been 'an abuse of discretion' (*Esposito* v. *Lazar, supra*, 2 N.J. 257, 259 (1949); *Elvin* v. *Public Service Coordinated Transport, supra* (4 N.J. Super. 491, 494 (App. Div. 1949); or in the more modern terminology "a manifest denial of justice."' See *Lindroth* v. *Christ Hospital*, 21 N.J. 588, 596 (1956); *Conklin* v. *Miele's Motor Transportation, Inc.*, 43 N.J. Super. 420, 428 (App. Div. 1957)."

Followed in *Rosetti* v. *Public Service Coordinated Transport*, 53 N.J. Super. 293 at 297 (App. Div. 1958).

which holds that failure to object does not deprive Court of authority to direct a new trial. R.R. 1:5-3(c), 2:5, 4:5-10(b); 4:61-4, 4:63-1, 4:63-2.

And at page 300, Judge Hall states that;

> "Appellants also argue that plaintiff cannot object to any error in the Court's comments because of the failure of their attorney to object at the time. However, the failure to make timely and adequate objection does not deprive the trial judge of the authority in the exercise of his judicial discretion as above defined, to order a new trial. A trial court may, even on its own initiative, order a new trial (R.R. 4:61-4) whenever it feels that substantial, even though unnoticed, error had been committed (R.R. 4:63-2), on the same basis as an appellate court will note plain error (R.R. 1:5-3 (c), 2:5; *In re Stern, supra* (11 N.J. 584, 1935)."

It is respectfully submitted that the trial Court erred in refusing to set aside the verdict and grant a new trial and that defendants were denied substantial justice thereby; and that the Appellate Division erred in affirming the judgment of the Law Division.

And that this Court can review the record of the State Courts' findings of facts under the circumstances disclosed by the full record in the case under review, is established by its decisions. See, *Interstate Amusement Co.* v. *Albert*, 239 U.S. 567; *Carlson* v. *Curtiss*, 234 U.S. 106; *N.C.R.R.* v. *Zachary*, 232 U.S. 258, 259; *Southern Pacific R.R.* v. *Schuyler*, 227 U.S. 601, 611; *Creswill* v. *Knights of Pythias*, 225 U.S. 246, 261; *Craig* v. *Harney*, 331 U.S. 373, 374 (1947); *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 121 (1954); *Georgia Ry. & Elec. Co.* v. *Decatur*, 295 U.S. 165, 170, 171 (1935); *Brinkerhoff dec. Co.* v. *Hill, Treasurer &c.*, 281 U.S. 673, 681, 682 (1930).

And in *Chessman* v. *Teets*, 354 U.S. 156 (1957), this Court stated that:

> "Evidently it needs to be repeated that the overriding responsibility of this Court is to the constitution of the United States no matter how late it may be that a violation of the Constitution is found to exist. * * * The proponent before the Court is not the petitioner but the Constitution of the United States."

And in *Griffin* v. *People of the State of Illinois*, 351 U.S. 12, 16, 17, this Court stated that:

> "Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. This hope, at least in part, brought about in 1215 the royal concessions of Magna Charta: 'To no one will we sell, to no one will we refuse, or delay right or justice. * * * No free man shall be taken or imprisoned, or disseised, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him nor send upon him, but by the lawful judgment of his peers or by the law of the land.' "

REASON V

The real taking, we respectfully contend, occurred as early as 1954-1955, as outlined *supra*. The condemnation suit was commenced September 29, 1958, when the Housing Authority filed its Complaint. The jury, on the trial on appeal, viewed the subject premises on June 25, 1959, when the whole Coalport area had been devastated, its occupants had moved away, and only a few buildings remained, including the subject premises (*supra*).

Inasmuch as the view of the jury thus took place, after adjoining properties had been demolished and

the entire area virtually laid waste, it is respectfully submitted that the jury may have been reasonably misled by the remarks of plaintiff's counsel in summation as follows:

> "You have viewed the property. You and I have viewed the property. You are at liberty, lady and gentlemen, to us your recollection of that view to determine what you feel those properties are worth. You can use it to modify, I guess you could go almost so far as to say extinguish the views of the experts at their fifty-fives and sixty-eights. You can use it if you think it is necessary, although I think we are just about right, to push up Mr. Bradley's figure. But whatever you want to do, you can use it in judging what you feel to be the true market value of these properties. And, of course, the ultimate decision rests with you." (D204a-20).

It is also respectfully submitted that the jury reasonably may have formed an erroneous view of their function and the bounds of their "brief authority" by reason of the Court's charge, an excerpt of which is as follows:

> "You have had an opportunity to view the premises. You may make use of that view of the premises in forming your judgment of the testimony and in reaching an opinion upon its consideration. Your opinion upon questions you are to decide should be based upon the testimony as thus understood by you and applied to what you have seen. It may well be that your judgment of the testimony may in some cases be modified, and in extreme instances perhaps be controlled as a result of your view of the premises. It may well follow as to some testimony, that to understand it in the light of your view is to discredit it, while as to other testimony, to so understand it is to accept it, even in the face of contradiction and denial." (D212a-15).

And it may be because of having vested the jury with such ultimate judicial function that the Court did not find its verdict "shocking," and that he felt that he did not retain the unquestionable judicial power to keep its proper exercise within this fact finding body's constitutional bounds. (D 228a-30; D229a-10).

But the effect of the view by the jury is of but little weight as a dispositive factor, if it can be so considered at all. It is merely informative, not decisive, and certainly could have no controlling effect when made four years after depletion became a certainty three years after acquisition commenced and deterioration commenced, and nine months after the filing of the Complaint and when the whole area was devastated.

The negative value of the view is determined in *Garland* v. *Furst Store*, 93 N.J. Law 127; 107 Atl. 38 (E. & A. 1919), as illustrated by the appropriate excerpts from the opinion of the Court of Errors and Appeals, as follows:

> "But the defendant respondent contends that, as there was a jury of view, the observations of the jurymen are evidence in the case, and, as a court of appeal cannot know what they saw, the verdict cannot be set aside. * * * (But)
>
> "* * * to avail a party of a fact known to a juror he must be sworn and examined as any other witness, * * * and for the further reason that the court and parties may know upon what evidence the verdict was rendered. * * *
>
> "In our opinion the question presented to a court of review should be decided upon what appears in the record brought up to the appellate tribunal, notwithstanding that a view was had by the jury."

REASON VI

It is also respectfully submitted that the Superior Court, Appellate Division, erred in affirming the judgment of the Law Division, and that their judgment is based upon a concept at variance with the testimony, apparent in the opinion, which is printed in the Appendix to this petition.

A. In stating that Mr. Bradley "did not value the land and the buildings separately."

The attention of the Court is directed to (D42a-14-40) (D50a-10-14) and to the analysis set forth in this petition, *supra*.

Further unequivocal confirmation of the fact that Mr. Bradley valued the buildings at 616 and 618 Perry Street, separately from the land may be deduced from his testimony, to which specific reference is made, *supra*, wherein the $2.80 per square foot figure was the result on the well-constructed brick building at 618 and containing fine living quarters, as compared with the identical figure of $2.80 per square foot for the frame building at 616, which Mr. Bradley stated was in poor condition. (D42a to D50a). He gave no specific value to the land.

B. In commenting that "Here the buildings were not originally designed for the commercial purposes to which they had been adapted."

It is respectfully urged that the subject premises were originally built as a store on the first floor, residence above, and is borne out even by the testimony of Mr. Bradley, as set forth in D46a 32-36.

C. In stating that "no owner or buyer would reconstruct these buildings—even the Finkles themselves

The buildings here had not—been designed by an owner who wanted them that way and would rebuild them."

The Finkles gave no testimony to this effect, nor is there any testimony upon which to base this statement.

D. In making reference to 616 Perry Street, wherein the apartment was stated to be in disrepair. An explanation of this disrepair, however, had been given in the uncontradicted testimony of Maurice A. Finkle, who stated that a member of the Housing Authority told the tenant to move long prior to the commencement of the condemnation proceedings. (170a 16 to 20).

Furthermore, only slight alterations would have been necessary to have had the building at 616 in good repair, (D 114a 3-30).

E. In commenting that "Bradley was not asked and did not testify how much he estimated the rental value to be, nor did he state the total amount of the 'taxes, insurance, water rent, maintenance, management charges,' which would have to be deducted from the rental income to leave a net of $2,000, $2,200," the Appellate Division evidently implied a failure of proof chargeable to the Defendants.

It is respectfully submitted that this gap in Mr. Bradley's testimony is fatal to Plaintiff, who, if it intended to rely on rental value, certainly should have elicited such data from its only witness; it was not the obligation of the Defendants to develop the Plaintiff's case.

In this connection, moreover, it is respectfully submitted that Mr. Bradley testified that 620 Perry Street contained a barber shop and wash room, rented for $65 a month, and 622 had a cigar store likewise renting

for $65 a month. The two stores combined had an area of less than 700 feet, yet rented for $130 a month (D52a-D53a). Would not Mr. Bradley, therefore, have had to admit that 616-618 store premises, having a total open store area of 2968 sq. feet (more than 4 times the combined store areas of 620-622 Perry Street), had considerable rental value?

F. In stating that "Defendants now say they wanted McCarthy to give his separate valuation of the land and the buildings 'to show the bases upon which he reached the opinion' that the properties were worth $68,578. However, defendants did not advance this ground for the admission of the testimony to the court below."

However, it is respectfully submitted, that the defendants did, in fact, advance this ground in the lower court but the Court ruled against them in their efforts (D70a 26-28) (D72a 6-8), and thereupon counsel deferred to the Court's ruling, as required in trial procedure.

G. In holding that Mr. Bradley testified: "on the rentals now being paid and being paid over a period of years for this type of property in that block, an investor-purchaser should be able to derive a net return of between 8 and 9 percent after paying all operating costs . . ." or ". . . something around $2,000, $2,200."

It is respectfully submitted that the Appellate Division erroneously concluded that Mr. Bradley placed a net return on subject premises at between $2000 and $2200.

The first part of the quotation referred to by the Appellate Division is found at (D51a 29-32). The latter part of the quotation—namely, "or something around

$2000-$2200," is at (D58a 14) and bears no reference to the first quotation. His answer of $2000-$2200, was arrived at when he said "nine times $22,400 in my head would be something around $2,000-$2,200," and could not have been interpreted as net return. His testimony that the barber shop brought a rental of $65 per month and the cigar store $65 per month, with a total combined area of less than 700 sq. feet would, if he were consistent, have required him to set a rental figure on the Finkle premises greater than that testified to by Mr. Bachman.

In view of the review of the testimony of Mr. Bradley in Paragraphs E and F aforesaid, and the analysis of his testimony *supra*, it is respectfully submitted that its inconsistent and untenable nature is such as to lack probative value.

Whereas the contrasting quality offered on behalf of defendants is such that the jury, by mistake, prejudice, lack of due consideration or comprehension, or by way of compromise, which is judicially condemned (*supra*), entirely disregarded the competent and unimpeached testimony and picked their verdict out of the air, constituting "a palpable perversion of the jury function," and resulting in "a manifest denial of justice" to defendants, which not only warrants and justifies setting the verdict aside and granting a new trial, but which should render such action vitally essential to justice and due process of law. And it is respectfully submitted that the Appellate Division erred in its concept of the testimony in the cause and in affirming the judgment of the Law Division.

REASON VII

The case presents important questions respecting standards for valuing property taken for public use, and there may be an apparent conflict in the decisions respecting the same.

SUMMATION

It is obvious, therefore, in summation, that the prime issue involved is the fair value of that which is taken from the owners and appropriated by the Housing Authority, in the exercise of its asserted power of eminent domain by virtue of the Legislative authorization under which it functions. In the exercise of that power it is bound, as is every branch of State action, from the highest to the lowest, by the exactions of the Federal and the State constitutions, and the Law of the Land, protecting the citizen in the possession, use and enjoyment of his property against invasion by the State. (See McGehee, "Due Process of Law," 26-27.) And in the exercise of that power of eminent domain, those constitutional safeguards demand that the owner whose property rights are thus invaded shall be justly compensated for what is taken from him, that "he shall be no poorer after the taking than he was before," that "*it is what he loses, not what the taker gains,*" that governs, and that the sovereign power in exercising that power shall be strictly and indeviably governed and controlled by those constitutional exactions of Due Process of Law, the Equal Protection of the Laws, and the Law of the Land.

In determining the fair value of what is thus taken various elements are considered, the value of the land, the value of the structures thereon, the damage to the remainder, if any, the treasure that may be buried beneath the surface, the income that may be derived from the use thereof, the location, the nature and desirability of the surrounding or adjacent neighborhood, and the desire and wish of the owner to remain in the possession, use and enjoyment thereof. Other elements may enter in under special circumstances. And in

determining that value, they who are vested with the function of fixing it ordinarily view the property, hear the testimony that may be produced bearing upon it, receive the instructions of the tribunal regarding the applicable law governing the situation, and then, after due deliberation, render their award.

The testimony adduced, except as to general surrounding conditions, is that of witnesses who are qualified as experts to give their opinion as to value, and they who are to make the award are bound by the evidence thus adduced, the same as in all civil actions. They cannot lightly lay that evidence aside, or disregard it; and award a compensation they may choose to determine, which has no legal basis to support it. It must find a justification in the evidence.

In the present instance the usual course was followed. The jury viewed the property involved; various witnesses testified regarding the value; the Court instructed the jury respecting the applicable law; and the jury rendered its verdict awarding the sum of $20,000.00 to the owners. Certain exceptions were taken to the Court's rulings and the Court's charge to the jury in the course of the trial. The owners took action to overthrow the jury's award and to obtain a new trial, but their motion to this effect was denied by the Court, and appropriate objection to the denial was noted on the record. From the final judgment thus entered the present appeal to the Appellate Division was taken by the owners.

The only witness produced by the Housing Authority in behalf of the value they claimed should be fixed for the property taken was Vincent P. Bradley, a real estate broker of long experience, and who had been retained by the Federal and State agencies interested

in the housing project to appraise the entire tract involved, and who had commenced his appraisals in 1954, at which time it became known to the community that the entire so-called Coalport area, shown by the Exhibit P-1, was to be cleared and the buildings demolished. From that time on the exodus of population continued, about 400 families moved out, repairs ceased, and tenancies and business waned and disappeared, and at the time the Housing Authority filed its Complaint in this action, on September 29, 1958, only a few buildings remained, among them the two here involved, No. 616 and No. 618 Perry Street. No recent repairs had been made to No. 616, but No. 618, in which one of the owners had his living apartments, was in excellent condition. Both had communicating dry goods and merchandise stores on the first floor, and that business had been carried on there by the family of the present owners for many years. There was no other available location in the area for the continuation of the business. Most of it had departed with the evacuation of the area. Perry Street, however, was one of the main thoroughfares east and west through the city, and the block in which the present properties were located was directly opposite the large school tract of the former State Normal and Model Schools, and the present city Grant School. The surrounding neighborhood toward East State and Clinton Streets is a high class neighborhood, containing the Swamp Angel war memorial, churches, apartment houses, schools and school dormitories, the Masonic Temple, the Mt. Carmel Guild, and the Y.M.C.A. building. In the same block with Nos. 616 and 618 there had been previously business stores, doctors' residences and offices, and other like buildings, but following the announcement of the Coalport project in 1954, there

had been a general deterioration and lack of upkeep as stated.

Under those circumstances the owners contended that the real value of their property should be considered from the point of view of conditions as they existed at the time of the announcement, but their contention was overruled by the Court, and the value of the property as of September 29, 1958, when the Complaint was filed, was the standard adhered to, and the view by the jury in June 1959 was what they carried with them to the jury room. Objection to the ruling was also noted.

In fixing his value of the property taken, Mr. Bradley, though admitting lack of construction qualifications, testified that he valued the building on No. 616 at $7,000.00, and that it was in very poor condition. He valued the building on No. 618 which was in excellent condition, at $11,650. He then testified that, in his opinion, the properties as a whole had a value of $22,400.00, and that that was their fair market value as of September 29, 1958. He also referred to several sales in the near vicinity which he felt were comparable, and which are discussed supra.

When, however, the owners produced the witnesses McCarthy, DiNola, and Bachman, they were not permitted to show the separate value of the buildings and the land, but were confined to the statement of the value which in their judgment a willing buyer would pay and a willing seller would sell for, and were not permitted to show how they reached that conclusion. And Mr. DiNola, governed by that ruling, was only permitted to describe the condition of the buildings, and not to express a construction expert's opinion as

to the buildings value. Appropriate objection was also noted to this ruling.

Regardless of that, however, it should be noted that as against the testimony of Mr. Bradley, fixing an over all value of $22,400.00, was the testimony of Mr. McCarthy, $68,578.00, and Mr. Bachman, $55,000.00, both real estate brokers of long experience and Mr. McCarthy, a building construction operator of wide experience, to the effect that the properties had an overall value greatly in excess of Mr. Bradley's figure; and Mr. DiNola, also a construction expert of long experience, testified as to the fine condition of No. 618 and the slight expense involved in restoring No. 616. Mr. Maurice Finkle and Mr. Nathan Finkle both testified as to the fine condition of No. 618. This testimony was not rebutted, and these witnesses were in no wise impeached. There is no testimony in the record fixing $56,000 as the value of the property taken. It seems clear, therefore, that the jury entirely disregarded the evidence and jumped to a valuation having no basis in the proofs. That this should have been sufficient to warrant the trial Court in setting aside the verdict and directing a new trial, seems to be in accord with the established authorities, and in failing to do so, it is respectfully submitted he erred. And that there was no sustainable basis for the jury's verdict, seems obvious.

It is also respectfully urged that the Court below erred in limiting the date of the fixing of the value of the property at September 29, 1958, the date of filing the Complaint, in view of the fact that at least four years prior thereto announcement was made of the project and there was a stampede from the condemned area with an accompanying depreciation of

business, occupation, maintenance, and general improvement and upkeep of the area, resulting naturally in a picture which in 1958 and a jury's view of the subject premises and surrounding area in June, 1959 could not compare with that of 1954.

An appropriate request to charge thereto was made by the defendants (D219a-14-25). Upon the Court's failure to charge this request an appropriate objection was made (D215a-6-22).

In addition thereto the equitable doctrine, now available for application in the Law Division, should have been applied permitting the jury to visualize the situation as of the time the Housing Authority announced its intention to demolish the area, which could have been shown clearly by the evidence of those familiar with it. Defendants' specific request to charge to that effect was refused. Appropriate objection was noted.

In this respect, too, the jury were encouraged, in the view that they were the sole judges of the evidence and by their view and their own estimate of the testimony they could find the value regardless of the weight of the evidence. Though there was no specific objection noted to this, it comes clearly within the plain error rule, R. R. 1:5-3(*e*).

Defendants also contended, and requested the Court to charge, that the loss of business and interference with business profits, was an element to be taken into account in determining the amount of the award. This, however, was also refused, and an appropriate objection noted. (D219a-1; D214a-35 to D215a-1).

The analysis of the testimony of the several witnesses has been above stated, and a further review thereof would be unduly repetitious and unwarranted. But it